In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-4

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 17-21) is not reported. The opinion of the court of appeals (Pet. App. 15-16) is reported at 496 F.2d 620.

JURISDICTION

The judgment of the court of appeals was entered April 30, 1974. The petition for a writ of certiorari was filed July 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Puyallup Indian Reservation, which was established in 1854 by the Treaty of Medicine Creek, 10 Stat. 1132, was terminated by subsequent Acts of Congress allowing the sale without restriction of much of the land within the Reservation.

TREATY AND STATUTES INVOLVED

Articles II and VI of the Treaty of Medicine Creek of December 26, 1854, 10 Stat. 1132, are set forth at Pet. App. 22-23.

The Act of March 3, 1893, 27 Stat. 612, 633-634, is set forth in pertinent part at Pet. App. 27-29.

The Act of April 28, 1904, 33 Stat. 565, is set forth at Pet. 4-5.

STATEMENT

This case was brought by the United States to resolve a dispute between it and the State of Washington as to whether the Puyallup Indian Reservation continues to exist.[1] Decision of this issue was necessary to determine the extent of the fishing rights of the Puyallup Tribe on the portion of the Puyallup River within the Reservation boundaries.

The controversy was presented to the district court on a detailed stipulated record (R. 213-264).[2] The district court, prior to this Court's decision in *Mattz* v. *Arnett*, 412 U.S. 481, held that because most of the land in the Reservation had been disposed of free of restriction, the Reservation "* * * neither legally, actually, nor practically exists" (Pet. App. 19), and that the tribal "on reservation" fishing rights were extinguished when the reservation was extinguished.

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[1] This question was specifically left undecided by this Court in *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 394 n. 1.

[2] "R" refers to the record in the court of appeals.

The court of appeals reversed, concluding that there was no meaningful distinction between the legislation and historical background in this case and the situation in *Mattz* v. *Arnett, supra.* In neither case did Congress, in allowing the sale of Indian land within a reservation, abolish the reservation; indeed, the court found the continuing congressional and agency recognition of the Puyallups "* * * to be substantially more impressive than that of the Klamaths" (Pet. App. 16). The court accordingly determined that the Puyallup Indian Reservation continues to exist (Pet. App. 15-16).

The stipulated facts essentially showed the following: The Puyallup Reservation was established by the Treaty of Medicine Creek in 1854 and its boundaries were fixed and expanded by Executive Orders of January 20, 1857, and September 6, 1873 (R. 219, 222). The Reservation as enlarged encompassed approximately 18,000 acres including a portion of the Puyallup River (R. 223).

In 1884, Congress authorized the President to survey the Reservation and to make allotments to individual Indians as he deemed advisable (R. 224; 23 Stat. 76, 88-89). Restricted patents were thereafter issued to approximately 167 Indian allottees for an area of approximately 17,463 acres (R. 225). An "Agency Reserve" was also created encompassing approximately 599 acres (R. 225). None of the patents issued included the bed of the Puyallup River (R. 225-226). No mention was made of the abolition or termination of the Reservation or of Indian fishing rights.

After Washington's admission to the Union in 1899, despite its renunciation of jurisdiction over Indian lands (R. 227), there was considerable pressure by non-Indians for land within the Reservation boundaries (R. 227-243). In 1890 a commission was established by Congress "to

visit the Puyallup Reservation" and to consider, among other things, whether restrictions should be removed from allotments to Indians (thus allowing non-Indians to purchase land within the reservation from their Indian owners). 26 Stat. 336, 354. In 1893 a second commission was established to select and sell surplus lands of the Reservation, the proceeds to become a school fund for the Tribe. 27 Stat. 612, 633. That Act also provided for the termination after 10 years of the restrictions on allotments already made to Indians *(ibid.)*. Although the two Acts opened the way for non-Indians to acquire Reservation land, neither Act purported to abolish or diminish the Reservation—despite suggestions of the Puyallup Indian agent after the first commission report that the boundaries be changed to diminish the Reservation (R. 232-237).

In 1904, by Act of April 28, 1904, 33 Stat. 565 (see Pet. 4), Congress reaffirmed the part of the 1893 Commission Act allowing restrictions on allotments to terminate after 10 years, thus eliminating title problems for purchasers of such land.

By 1920, all of the formerly allotted lands within the Reservation either had been sold for the benefit of the allotment owners, or had become the unrestricted fee property of the allotment owners (R. 249), but some tribally held land remained (R. 253).

In 1934, after passage of the Indian Reorganization Act, 48 Stat. 984, the Tribe inquired of the Department of the Interior as to its eligibility for reorganization (R.253). The Department replied that since approximately 60 acres of the Reservation remained in tribal ownership, the Tribe was eligible to reorganize under the Act *(ibid.)*. On May 13, 1936, the Secretary of the Interior approved the Constitution and bylaws of the "Puyallup Tribe of the Puyallup Reservation * * *" (R. 255).

Since the reorganization of the Puyallup Tribe, the Department of the Interior and the Department of Justice have consistently recognized that the Tribe and Reservation still exist and that the unsold lands of the Tribe are held in trust for the Tribe by the United States (R. 255, 258-260, 261-262). Congress has also recognized the Puyallup Tribe as still existing; it has incorporated the Tribe's Constitution into federal legislation, 56 Stat. 1040 (December 5, 1942); 53 Stat. 1405 (August 11, 1939); and has provided appropriations for the Tribe's benefit, *e.g.*, 34 Stat. 1015, 1050; 45 Stat. 378; 50 Stat. 564, 587; 52 Stat. 291, 314; 53 Stat. 1405-1406.

The Attorney General of the State of Washington, in 1957, in disclaiming compensation for a federal taking of a portion of the bed of the Puyallup River, stated that it was "* * * within the existing Puyallup Indian Reservation" (R. 261-262).

ARGUMENT

The most that can be pointed to in support of petitioner's argument that Congress abolished the Puyallup Reservation are Acts which permitted the allotment of reservation lands and a subsequent Act that confirmed the removal of restrictions upon allotted (but not unallotted) lands. There is nothing in any of these Acts which even remotely suggests an intention by Congress to abolish the Puyallup Reservation.[3] Peti-

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[3]The letters quoted by petitioner (Pet. 11-12) as evidence that Congress by the Act of April 28, 1904, intended to abolish the Puyallup Reservation show no more than an intent to quitclaim sales of previously allotted land within the reservation. The committee reports on the bill make this limited purpose clear. See H. Rep. No. 301, 58th Cong., 2d Sess.; S. Rep. No. 1935, 58th Cong., 2d Sess. See also *Eells* v. *Ross*, 64 Fed. 417 (C.A. 9), specifically holding that the Act of March 3, 1893, which provided for the allotment and removal of restrictions on most of the Puyallup

tioner's argument thus rests on the proposition that because most, but not all, of the Reservation land is owned by non-Indians the Reservation status itself, by implication, must fall. But this Court has repeatedly held that "* * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine,* 215 U.S. 278, 285; *United States* v. *Nice,* 241 U.S. 591; *Seymour* v. *Superintendent,* 368 U.S. 351, 359. This principle was reaffirmed by Congress in 18 U.S.C. 1151, which provides in its definition of Indian country:

> Except as otherwise provided in sections 1154 and 1156 of this title, *the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent,* and, including rights-of-way running through the reservation * * *. [Emphasis added.]

That sale of land within a reservation does not terminate the reservation was, of course, most recently affirmed by this Court in *Mattz* v. *Arnett, supra,* 412 U.S. at 504-505, where the Court stated that despite an act opening most of the reservation to settlement by non-Indians "* * * we are not inclined to infer an intent to terminate the reservation." When

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Reservation, did not abolish the Reservation. See also *United States* v. *Celestine, 215 U.S. 278, 287,* citing (and discussing) *Eells* with approval. Since the Act of 1904 merely confirmed the removal of restrictions already accomplished by the Act of 1893 at issue in *Eells*, that case is a strong and contemporaneous affirmance of the continued existence of the Reservation.

Congress desires to terminate a reservation it knows how to effect its desires. *Id.* at 504, n. 22. That decision governs here.

Here, as in *Mattz*, a Northwest coast fishing Tribe by treaty gave up most of its land in return for a small reservation along the mouth of a river so that it could sustain itself through fishing. In each case, the Tribe's non-Indian neighbors were anxious to obtain access to reservation land—in *Mattz* for lumbering, in this case to expand the City of Tacoma. In each, Congress chose a less extreme invasion of tribal rights than some proposed. In neither case did Congress pass a law "terminating" the reservation, "diminishing" it, or changing or abolishing its boundaries—although such proposals had been made. In each case the tribe ultimately lost ownership of most of its land, but never lost ownership of all of it and never, in any way, consented to a loss of the fishing rights incident to the Reservation boundaries. Nor did Congress specifically take, or compensate the Tribe for, any fishing rights. In sum, it is appropriate to note here, as the Court did in *Mattz*, that "Congress was fully aware of the means by which termination could be effected" *(id.* at 504), and did not choose to terminate the Reservation.

2. A word should be said about the practical consequences of the Ninth Circuit's opinion. The effect on non-Indians of living within an Indian reservation is insignificant. They are taxed by the state and its subdivisions and, except in transactions with Indians, are fully subject to state civil and criminal jurisdiction.

To the members of the Puyallup Tribe, however, the existence of their reservation means everything. It is their identification with their former lands. It evidences the fact that the United States has kept its word. More mundanely, it assures the Indians the "on reservation" fishing rights provided by their treaty, and provides them federal, rather than state, jurisdiction and assistance in many of their activities.

The Tribe's consistent assertion of these rights speaks for their continuing importance. It would be an unjust, and as we have shown, an unwarranted result to hold that in conveying to private owners most, but not all, of the land within its Reservation, the Tribe, without so intending, without compensation, and without congressional or executive consent, must be held to have disposed of valuable on-reservation fishing rights, and the governmental advantages of the Reservation itself.

3. The decision below is thus correct. There is no conflict in federal court decisions on this question. To the extent that earlier state court decisions are contrary, they are governed by the subsequent decision of the Ninth Circuit on this federal question — a question that this Court recognized in both *Puyallup Tribe* v. *Department of Game, supra,* and *Satiacum* v. *Washington,* 414 U.S. 1, as open. The issue has now been settled by the Ninth Circuit, on a complete record, in accord with this Court's decision in *Mattz* (and the Ninth Circuit's prior decision in *Eells* v. *Ross, supra*) and no further review is required.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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